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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PRINCESS COLEMAN, Defendant and Appellant.	B286380 (Los Angeles County Super. Ct. No. BA456512)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed in part and remanded with directions.

Joseph T. Reisz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Princess Coleman appeals the judgment entered following a jury trial in which she was convicted of one count of first degree residential burglary. (Pen. Code,[1] § 459.) Appellant admitted the prior convictions as alleged and was sentenced to 9 years in state prison. She contends the trial court prejudicially erred in failing to give an expert witness instruction sua sponte and by limiting her cross-examination of one of the police officers who testified for the prosecution. We disagree and affirm the judgment of conviction. However, in light of the recent enactment of Senate Bill No. 1393,[2] we remand the matter to the trial court to exercise its new discretion to impose or strike the serious felony enhancement under section 667, subdivision (a)(1).

FACTUAL BACKGROUND

On April 14, 2017, around 5:30 a.m., Azucena Hernandez left her home to go to work. Ms. Hernandez lived in the first floor apartment in a building located behind a house with multiple residents. She left the apartment unlocked that morning because the key was jammed in the lock to the front door making it inoperable, and she had misplaced the key to the security screen door.

Between 7:15 and 7:30 that morning, Marta Franco, one of Ms. Hernandez's neighbors who lived in the front house, saw appellant at the door to Ms. Hernandez's apartment. The front door stood ajar, and the screen door was half open. Ms. Franco texted Ms. Hernandez to let her know someone was at her apartment. Upon receiving Ms. Franco's text, Ms. Hernandez

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[1] Undesignated statutory references are to the Penal Code.

[2] Statutes 2018, chapter 1013, section 2.

called Andres Munoz, another neighbor who lived in the front house, and asked him to check on her apartment. While he was still on the phone with Ms. Hernandez, Mr. Munoz walked to the apartment and saw that the bathroom light was on. Both the front and screen doors to the apartment were closed, and the screen door was locked. Mr. Munoz yelled, "Azucena!" and knocked on the door. Appellant opened the front door and through the screen door said, "She's in the shower."

Mr. Munoz called the police. Among the first officers to respond to the scene was Officer Carl Thompson, who activated his body camera. When additional units arrived, police surrounded the apartment, announced their presence, and ordered anyone inside the apartment to come out.

Refusing to heed commands to open the door and come out, appellant spoke to police through the security screen door, demanding to know why they were there and what they wanted. At first appellant claimed she lived in the apartment, then she said she was house-sitting, and finally she told police she was cleaning. Eventually, appellant and a male companion (codefendant Anthony Chapman) exited the apartment, whereupon appellant was handcuffed and searched. A necklace with a key on it was found wrapped around appellant's hand. Appellant claimed that she lived in that apartment and the key belonged to her. But when Ms. Hernandez arrived home she identified the necklace as her own. She had last seen the necklace in a drawer next to the kitchen, but no key had been on the chain. The key fit the lock to the security screen door.

Immediately after appellant and Chapman had been detained, Officer Thompson walked through Ms. Hernandez's apartment taking pictures. His body camera also recorded video of the state in which the defendants had left the apartment and

Ms. Hernandez's belongings. Ms. Hernandez also toured the apartment when she returned home that morning to identify anything that was missing or did not belong to her and to confirm the state in which she had left the apartment.

Ms. Hernandez testified that "[e]verything [had been] moved around." Officer Thompson described the apartment as appearing to have been "ransacked." Ms. Hernandez's clothing had been taken from her closet and piled on the couch with men's and women's clothing that did not belong to her. Toiletries had been moved around in her bathroom, and several items from the bathroom and living room had been placed in a trash can. Two laptops and electronics chargers that Ms. Hernandez had left in a drawer were on her bed, along with a bag containing three screwdrivers and a pair of scissors that did not belong to her. An iPhone charger on the bed was connected to an extension cord that ran through a broken window in Ms. Hernandez's bedroom, across the area between the apartment and the front house, and through a window of the front house. The extension cord did not belong to Ms. Hernandez, and the window had not been broken when she left for work that morning. Ms. Hernandez also found a potted plant on her television stand and a smoking pipe under her bathroom sink, neither of which was hers. There was a broom on the floor that appeared to have been used to sweep up a pile of dirt in the middle of the floor.

The only items Ms. Hernandez identified as having been taken from the apartment were the key and the necklace. At the police station, appellant and Chapman identified as theirs the items found in the apartment that did not belong to Ms. Hernandez.

DISCUSSION

I. The Trial Court Did Not Err in Failing to Instruct the Jury About Expert Witness Testimony or in Limiting Appellant's Cross-examination of Officer Thompson

A. *Relevant background*

Officer Thompson testified briefly on direct examination to his background as a police officer and his experience investigating burglaries. He then testified about the course of events after he arrived at Ms. Hernandez's home. In describing the state of the apartment, the officer testified that it appeared to have been "ransacked" and explained that "[u]sually when an apartment is burglarized, the suspects ransack or rummage through it, like taking things out of drawers, taking things out of closet[s], throwing things around, trying to find something worth stealing." After further questioning about the condition of the apartment, the prosecutor asked, "Given your background and experience, what you observed in the apartment, the way it was rummaged through, is that consistent with a burglary in your experience?" Officer Thompson answered, "Yes." Appellant's trial counsel objected on the ground that the officer was offering "a legal opinion." The trial court overruled the objection.

In her cross-examination of Officer Thompson, appellant's trial counsel asked, "[The prosecutor] asked you, in your opinion, about this case, whether or not it was burglary. Is that correct?" The prosecutor objected that appellant's counsel had misstated the prosecutor's question, which was "if it was consistent, not if it was a burglary." Defense counsel rephrased the question, and Officer Thompson confirmed that he found "the incident in this case was consistent with a burglary." Defense counsel then asked

the officer for his opinion about what constitutes a trespass. The district attorney objected and the trial court called a sidebar.

During the sidebar, the court stated that the officer could not opine as to other possible charges based on the evidence because it is not his role to determine whether or what criminal charges to bring. Defense counsel argued that the prosecution had opened the door to this line of questioning by asking the officer for his opinion as to whether the evidence established a burglary. The district attorney responded that he had not asked for a legal conclusion, but only whether what the officer observed was consistent with a burglary.

Appellant's trial counsel continued to insist she be allowed to question the officer as to whether he could tell the difference between a trespass and a burglary, arguing that such questioning was relevant because the officer had already given his opinion that the evidence was consistent with a burglary. The court responded that the jury, not the officer, is the finder of fact. It was therefore up to the jury to determine whether the crime was committed; the officer's assessment of that was wholly irrelevant and "completely disallowed" under Evidence Code section 352. The court then admonished the jury that it alone was the trier of fact in the case. Thus, if any witness expressed an opinion as to appellant's guilt, that opinion was irrelevant and should be disregarded.

In the next court session following codefendant Chapman's cross-examination of the officer, appellant's trial counsel sought to revisit the issue. Defense counsel argued that as a police officer investigating the case, Officer Thompson was not testifying as a lay person. Rather, his opinion was that of an expert witness, and the defense should be allowed to inquire into the basis for that opinion. The court repeated that the officer's

opinion as to appellant's guilt was not relevant. In any event, it was quite obvious from the officer's arrest of the defendants for burglary that he believed they had committed a burglary. The court found that the admonition had adequately informed the jurors that they and not the officer were to determine the defendants' guilt.

Appellant's trial counsel tried one last time to argue that the officer's expert opinion should have been elicited through a proper hypothetical, but the court interrupted, declaring, "It's not an expert opinion." Counsel continued, "Not an expert opinion, but even so, you never ask the ultimate question of whether or not something occurred, and in this case, the question was asked, and it was implied in the officer's answer, and it was implied in the form of the question." The court concluded the discussion by declaring, "I don't necessarily agree with all of that, but for our purposes, the jurors are aware of what their function is."

B. *The trial court had no sua sponte duty to instruct on expert witness testimony because the officer's testimony did not constitute an expert opinion*

Appellant contends the trial court erred in failing sua sponte to instruct the jury on how to evaluate expert testimony based on Officer Thompson's statement that the condition of Ms. Hernandez's apartment was consistent with a burglary having taken place. We disagree.

When the opinion testimony of an expert is received into evidence, the trial court has a sua sponte duty to instruct the jury as to how to evaluate that testimony. (Pen. Code, § 1127b; *People v. Bowens* (1964) 229 Cal.App.2d 590, 599–600; *People v. Haynes* (1984) 160 Cal.App.3d 1122, 1136–1137.) Evidence Code section 801, subdivision (a), defines expert testimony as opinion testimony "[r]elated to a subject that is sufficiently beyond

common experience." Evidence Code section 720, subdivision (a) states that a person is "qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

On the other hand, "[a] lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. (Evid. Code, § 800.)" (*People v. Farnam* (2002) 28 Cal.4th 107, 153; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1032.) Such an opinion is admissible where no particular scientific knowledge or specialized background is required. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1383.) "Unlike an expert opinion, a lay opinion must involve a subject that is ' "of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " (*Id.* at p. 1384.) However, "[m]atters that go beyond common experience and require particular scientific knowledge may not properly be the subject of lay opinion testimony." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.)

Applying these principles, courts have held that a police officer testifying as a layperson on the basis of experience can opine about the significance of marks on a shotgun shell (*People v. Lewis* (2008) 43 Cal.4th 415, 503–504); that certain wounds had been inflicted on the victim after she was either dead or had lost a considerable amount of blood (*People v. Navarette* (2003) 30 Cal.4th 458, 511); that a shoe and a shoeprint appeared similar (*People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608); and most recently, that the most common excuse given by witnesses to avoid cooperating in a police investigation is that they did not see

anything because they were in the bathroom (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1034).

Here, by way of background, Officer Thomas testified that he had been a police officer for seven years and during that time he had investigated burglaries. Later he described as "ransacked" the condition in which he found Ms. Hernandez's apartment immediately after appellant and Chapman were ordered out by police. Based on his experience and his observations, Officer Thompson believed the state of the home was consistent with someone looking for something to steal—that is, a burglary.

In our view the officer's testimony did not amount to an expert opinion on burglary, but constituted a lay opinion which was rationally based on the witness's personal observations at the crime scene and at the scenes of numerous burglaries at which he had been present. (See *People v. Nguyen*, *supra*, 61 Cal.4th at p. 1034 ["the disputed testimony was based upon [the detective's] personal observations at numerous gang-related crime scenes, not his expert opinion"].) Officer Thompson's opinion that the ransacked state of the apartment was consistent with someone looking for something to steal did not require any specialized training and was a matter of such common knowledge that anyone of ordinary education could reach the same conclusion as intelligently as the witness. (*People v. Fiore*, *supra*, 227 Cal.App.4th at p. 1384.)

A witness does not become "a de facto expert simply because his or her personal observations may be partially informed by some professional training." (*People v. Jablonski* (2006) 37 Cal.4th 774, 823.) Thus, the mere fact that Officer Thompson testified in his capacity as a police officer did not make his experienced observations expert testimony any more than a

police officer testifying that the observed redness of a defendant's eyes indicates intoxication offers an expert opinion. (*People v. Navarette*, *supra*, 30 Cal.4th at p. 493; *People v. Williams* (1988) 44 Cal.3d 883, 914.)

The People did not attempt to qualify Officer Thompson as an expert or present his testimony as expert opinion, but treated it as lay opinion. The prosecutor emphasized that the jurors should apply their common sense in determining the intent element of burglary and argued that "the only reasonable inference when something is ransacked is that someone is looking for something" to steal. Even appellant's trial counsel agreed with the trial court that the testimony did not qualify as an expert opinion. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 823 [it is the trial court that makes the determination whether a witness qualifies as an expert on a subject].)

In sum, because no expert opinion was presented to the jury, the trial court had no sua sponte duty to instruct the jury as to how to evaluate expert testimony.

C. *The trial court did not abuse its discretion in limiting appellant's cross-examination of Officer Thompson*

Appellant contends the trial court violated her federal constitutional rights to due process, a fair trial, to present a defense, and in particular, the Sixth Amendment right to confront witnesses by prohibiting her trial counsel from cross-examining Officer Thompson regarding his opinion of the evidence. After Officer Thompson testified on direct examination that the state of Ms. Hernandez's apartment was consistent with a burglary having taken place, on cross-examination appellant sought to elicit the officer's opinion as to whether the evidence was consistent with a trespass. The court found the officer's opinion

on the matter to be irrelevant and so limited appellant's cross-examination. We find no constitutional violation in the trial court's slight restriction on appellant's cross-examination of Officer Thompson in this case.

As our Supreme Court has explained, "[a] criminal defendant's constitutional right to confront witnesses is violated when the court prohibits the defendant from conducting otherwise appropriate cross-examination designed to show a prototypical kind of bias on the witness's part, and thereby provide the jury with facts from which it could appropriately draw inferences regarding the witness's reliability. But not every restriction on a defendant's cross-examination violates the Constitution. The trial court retains wide latitude to restrict repetitive, prejudicial, confusing, or marginally relevant cross-examination. Unless the defendant can show that the prohibited cross-examination would have created a significantly different impression of the witness's credibility, the trial court's exercise of discretion to restrict cross-examination does not violate the constitutional right of confrontation." (*People v. Sánchez* (2016) 63 Cal.4th 411, 450–451; *People v. Williams* (2016) 1 Cal.5th 1166, 1192; *People v. Linton* (2013) 56 Cal.4th 1146, 1188 [court " 'retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance' "].) We therefore review for abuse of discretion appellant's claim that the trial court's restriction of the scope of cross-examination violated appellant's rights under the confrontation clause. (*People v. Peoples* (2016) 62 Cal.4th 718, 765.)

We begin with the proposition that "[n]o evidence is admissible except relevant evidence." (Evid. Code, § 350.) The Evidence Code defines "relevant evidence" as " 'evidence . . .

having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' " (*People v. Gomez* (2018) 6 Cal.5th 243, 288; Evid. Code, § 210.) " 'The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value.' (*People v. Horning* (2004) 34 Cal.4th 871, 900.)" (*People v. Anderson* (2018) 5 Cal.5th 372, 402.) Nevertheless, a trial court abuses that discretion when it exercises it " 'in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 195.)

We find no abuse of discretion here. Officer Thompson opined that, based on his experience of having viewed other burglary scenes, the ransacking of Ms. Hernandez's apartment was consistent with someone looking for something to steal, and thus in line with a burglary. Insofar as this opinion was "rationally based on [the officer's] perception and helpful to an understanding of his testimony" (*People v. Lewis*, *supra*, 43 Cal.4th at p. 504), it was relevant. On the other hand, Officer Thompson's opinion about what might constitute a trespass—an offense not charged in this case—was wholly irrelevant, because such testimony had no " 'tendency in reason to prove or disprove any disputed fact' " of consequence in the case. (Evid. Code, § 210; see *People v. Lewis* (2001) 25 Cal.4th 610, 640 ["a 'witness may not be examined on matters that are irrelevant to the issue in the case' "].)

Contrary to appellant's assertion in her opening brief, the officer did not testify that "the evidence he observed was consistent with a burglary and not a trespass," nor did he offer an expert opinion that a burglary had been committed. Moreover, to the extent his testimony could have been construed as giving an

opinion on the ultimate issue of whether a burglary had occurred, the trial court expressly instructed the jury to disregard it. We find no abuse of discretion in the trial court preventing appellant from cross-examining Officer Thompson on an issue it had specifically instructed the jury to disregard.

II. The Trial Court Has Discretion to Reconsider Imposition of the Five-year Enhancement Under Section 667, Subdivision (a)(1)

On September 30, 2018, the Governor signed Senate Bill No. 1393, which amends sections 1385 and 667 to give trial courts discretion to strike the five-year enhancement under section 667, subdivision (a)(1). The law became effective on January 1, 2019, and applies retroactively to cases in which judgment is not yet final on appeal. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date"], fn. omitted.)

Prior to Senate Bill No. 1393, section 1385, subdivision (b) expressly prohibited a trial court from striking " 'any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.' " (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045, fn. 2 [under § 1385, subd. (b), trial court has no discretion to strike § 667, subd. (a) enhancement].) Senate Bill No. 1393 eliminated this restriction.

In the context of Senate Bill No. 620, courts have held that remand is required absent a clear indication that the trial court would *not* have reduced the sentence if it had been aware of its discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) The trial court gave no such indication here.

Accordingly, on remand the trial court may consider whether to exercise its discretion to impose or strike the five-year prior serious felony enhancement under section 667, subdivision (a)(1).

DISPOSITION

The matter is remanded with directions that the trial court exercise its discretion to impose or strike the five-year prior serious felony enhancement under Penal Code section 667, subdivision (a)(1). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.